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No. 90-996

In The
Supreme Court of the United States
October Term, 1990

Colorado Interstate Gas Company,
Petitioner,

v.

Federal Energy Regulatory Commission, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT NATURAL GAS PIPELINE COMPANY OF AMERICA IN OPPOSITION

Paul E. Goldstein
701 East 22nd Street
Lombard, IL 60148

Paul Korman
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

J. Curtis Moffatt
Van Ness, Feldman & Curtis
1050 Thomas Jefferson Street
Washington, D.C. 20007

Joel I. Klein
(Counsel of Record)
Richard G. Taranto
Alan E. Untereiner
Onek, Klein & Farr
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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AFFILIATED CORPORATIONS

Pursuant to Rule 29.1 of the Rules of this Court, respondent Natural Gas Pipeline Company of America states that it has no non-wholly owned subsidiaries. Certain preferred stock aside, all of Natural's stock is owned by MidCon Corp., which is wholly owned by Occidental Petroleum Corporation.

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STATEMENT

This case arises out of a ratemaking proceeding before the Federal Energy Regulatory Commission (FERC or Commission) involving the tariff governing the sale of natural gas by petitioner Colorado Interstate Gas Company (CIG) to respondent Natural Gas Pipeline Company of America (Natural). The Commission found to be anti-competitive—and therefore eliminated as not "just and reasonable" under the Natural Gas Act (15 U.S.C.

§§ 717c(a), 717d(a))—a provision of the tariff that obliged Natural to make a certain minimum payment to CIG regardless of the amount of gas actually purchased. The court of appeals affirmed.

1. Prior to 1984, the tariff governing CIG's sale of natural gas to Natural entitled Natural to buy a specified quantity of gas from CIG. The tariff also required Natural annually to pay to CIG a minimum bill covering 90% of Natural's contractual entitlement of gas, even if Natural bought less gas from CIG. Pet. App. 3a & n.3. The amount Natural paid was designed to cover CIG's "fixed" costs, which were costs incurred by CIG regardless of volumes sold, as well as CIG's "variable" costs, which "consist principally of the cost of the gas itself." *Ibid.*

In 1984, the Commission eliminated the variable costs from the minimum bill, concluding that the collection of variable costs through minimum bills was anticompetitive and, hence, unjust and unreasonable. *Id.* at 3a-4a; *see Colorado Interstate Gas Co.*, 27 FERC ¶ 61,315, *reh'g denied*, 28 FERC ¶ 61,083 (1984), *aff'd*, 791 F.2d 803 (10th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). In that proceeding FERC expressly reserved the question of the validity of the remaining fixed-cost component of the minimum bill, noting its concern about the issue and directing the FERC staff to "consider the proper level of fixed cost recovery" in the next rate case involving CIG. *Colorado Interstate Gas Co.*, 27 FERC ¶ 61,315, at 61,583; *see also Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 811 (10th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).[1] That is the issue addressed in the present case.

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[1] On the same day that it eliminated CIG's variable-cost provision, FERC issued an order applicable throughout the industry that invalidated the variable-cost portion of minimum bills in all pipeline contracts. *See Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). That order left the

2. When CIG filed in 1985 for a general rate increase under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, it modified its rate structure by allocating its charges between a "demand charge" and a "commodity charge." The former covered roughly $9 million per year in fixed costs. The latter covered the remaining fixed costs, including roughly $15 million per year in "production and gathering costs and the return on equity and certain associated taxes," as well as CIG's variable costs. Pet. App. 3a n.3. Under that rate structure, which took effect after filing in 1985, Natural paid the demand charge "regardless of the amount of gas actually purchased"; it also paid CIG's 90% minimum commodity-charge bill covering the $15 million in fixed costs. *Ibid.*

The validity of the fixed-cost minimum commodity bill was immediately put in issue in the FERC proceeding involving the lawfulness of CIG's new rates. 31 FERC ¶ 61,096, at 61,181 (1985). After a hearing at which the Commission staff, Natural, and CIG argued and put on evidence concerning that issue, an administrative law judge (ALJ) concluded in May 1986 that CIG's fixed-cost minimum commodity bill was not "just and reasonable" and thus had to be eliminated. *See* Pet. App. 29a, 58a. The ALJ's ruling left CIG with a new rate structure—the "modified fixed-variable" (MFV) rate design—that guaranteed CIG's recovery only of those fixed costs that FERC policy determined should not be at risk, mainly those costs in the $9 million demand charge. *See* Pet. App. 60a.

On November 18, 1987, in Opinion No. 290, the Commission affirmed the ALJ's invalidation of the minimum commodity bill. Pet. App. 29a. The Commission explained that Natural and the FERC staff had the burden of proving that CIG's minimum commodity bill was anti-

legality of fixed-cost minimum bills "to be resolved in individual pipeline proceedings." *Transwestern Pipeline Co. v. FERC*, 820 F.2d 733, 735 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988).

competitive, but once that showing was made, the burden of production shifted to CIG to justify retention of the minimum bill. *Id.* at 58a-59a. CIG could try to meet that burden by showing, for example, that the guaranteed payment protected the pipeline's other customers from bearing the costs of take-or-pay liabilities that the pipeline would otherwise incur to its upstream suppliers. *Id.* at 60a.[2]

Applying that framework, the Commission first determined that its staff and Natural had met their burden of demonstrating—through Natural's evidence—that CIG's minimum bill stifled competition by eliminating " 'the legitimate competitive advantage which would ordinarily accrue to the low cost supplier,' " because " 'alternate supply sources must be priced lower than CIG's commodity rate by at least the amount of the minimum commodity bill before the two purchases are equally attractive to Natural.' " Pet. App. 59a (quoting Natural's witness). Concluding that this testimony was "sound theory" (*ibid.*), the Commission also cited GIG's concession that, like the industry generally, it was "in a 'gas over supply situation.' " *Ibid.* With "the burden of going forward" then shifted to CIG, the Commission concluded that CIG had not justified retention of its minimum bill, even though "CIG was well aware that its minimum bill was in issue and submitted evidence on the issue." *Id.* at 59a-60a. In particular, CIG had "shown no specific connection between its minimum bill and its take-or-pay obligations." *Id.* at 60a-61a. The Commission therefore invalidated the minimum bill "prospectively from the date of this order." *Id.* at 61a.[3]

[2] A "take-or-pay" clause in a producer-pipeline contract requires the pipeline "to take a specified volume of gas from a producer or, if it is unable to do so, to pay for the specified volume." *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Companies*, 111 S. Ct. 615, 622 n.3 (1991). Under *Atlantic Seaboard Corp.*, 38 FPC 91 (1967), *aff'd*, 404 F.2d 1268 (D.C. Cir. 1968), a minimum bill might be justified not only based on take-or-pay liabilities but also as a means of (1) "protecting the pipeline against the risk of not recovering the fixed costs in the commodity component" or (2) "protecting full requirements customers from bearing a disproportionate share of the fixed costs resulting from swings off the system by partial requirements customers." Pet. App. 60a. Petitioner does not press either of those two grounds in this Court, although it pressed them below. *See* Pet. App. 60a-61a, 76a-77a, 12a-18a.

On rehearing, the Commission rejected CIG's allegation that it had shifted the burden of proof to CIG, explaining again what it had said in *Transwestern Pipeline Co.*, 32 FERC ¶ 61,009 (1985), *reh'g denied*, 36 FERC ¶ 61,175 (1988), *aff'd*, 820 F.2d 733 (5th Cir. 1987)—that "the burden of persuasion was on the challenging parties," although persuasive evidence that the minimum bill was anticompetitive created "circumstances whereby a challenger would meet its burden unless the minimum bill's proponent was able to justify its retention." Pet. App. 74a-75a.[4] Here, the initial burden was met by the testimony of Natural's witness as well as CIG's own concession regarding excess supply. *Id.* at 74a, 75a. In these circumstances, the Commission continued, requiring CIG to justify its minimum bill worked "no unfairness" upon CIG, because CIG knew all along that the minimum bill provision was at issue and accordingly submitted evi-

[3] The Commission allowed CIG to collect its minimum bill from 1985, when the application for new rates was filed, until November 1987, when FERC issued its decision. The Commission specifically rejected Natural's argument that the minimum bill provision should have been eliminated retroactively to 1985. *See* Pet. App. 73a, 78a. That ruling was upheld on appeal. *See Natural Gas Pipeline Co. v. FERC*, 904 F.2d 1469 (10th Cir. 1990).

[4] CIG complained that reliance on *Transwestern* in this case was improper because *Transwestern* "create[d] a new policy with respect to burden of proof" yet was issued after the record in this case closed. Pet. App. 74a. FERC rejected the complaint, explaining that *Transwestern* was not new but "merely described the nature of [the Commission's] existing policy" pre-dating *Transwestern*. Pet. App. 74a. CIG does not press that argument in this Court.

dence on the question. *Id.* at 75a. CIG simply failed to justify retention of the minimum bill—first, because CIG's provision was "not designed to remedy *solely* its take-or-pay problem" (*id.* at 77a n.35 (emphasis added)); second, because despite CIG's references to "its discontinuances of gas purchases and its minimum bill and take-or-pay exposure and to Natural's decision not to take gas from CIG," CIG simply had not pointed to "any record evidence that *Natural's* cutbacks *caused or will cause* particular minimum bill or take-or-pay obligations to be incurred" (*id.* at 77a (emphasis added)).[5]

3. The court of appeals affirmed. Pet. App. 1a-26a. The court agreed that the Commission and Natural had carried their "initial burden of proof" on the issue of anticompetitiveness. *Id.* at 7a. The court first stated that the agency "was entitled to rely on the presumption of anticompetitiveness [of fixed-cost minimum bills] established in *Transcontinental Gas Pipe Line Corp.*, 40 FERC ¶ 61,188, at 61,589-90 (1987) (Opinion No. 260-A)" as well as on analogous FERC decisions finding *full-cost* minimum bills anticompetitive. Pet. App. 7a-8a & n.6. The court did not, however, conclude that the Commission had in fact relied on *Transcontinental*. Rather, the court explained that, in the administrative proceedings, the Commission had "relied not so much on the established presumption as on arguments made by [Natural]" that it found to be "'sound theory.'" Pet. App. 8a-9a. Those familiar, simple economic arguments—that, where supply

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[5] As to the first point, FERC noted that the minimum bill was not narrowly tailored to remedy only take-or-pay difficulties because "[u]der its minimum bill, Natural could incur minimum bill charges even if CIG has incurred no take-or-pay liabilities." Pet. App. 77a n.35. As to the second point, FERC noted the testimony of Natural's expert witness that "'CIG's customers other than Natural have reduced their takes'" (*ibid.*), thus making it unlikely that, as CIG simply asserted without support, there was a causal nexus between *Natural's* minimum bill and any take-or-pay liability.

exceeds demand, minimum bills deter purchasers from seeking alternative, cheaper gas and thereby keep prices artificially high—underlay the Commission's decision here, as they had in *Transcontinental.*[6] The court of appeals thus declined to disturb "FERC's reasonable showing of the anticompetitiveness of minimum bills, including CIG's." Pet. App. 11a-12a.[7]

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[6] The court of appeals noted that in establishing the *Transcontinental* presumption FERC had relied on three factors that "it considered common to every case given the current market: First, that gas supplies currently exceed demand; second, that where supplies exceed demand, a minimum bill by its very nature forecloses competition; and third, the likely effect of a minimum bill is to make it uneconomic to purchase on a least cost basis." Pet. App. 9a n.7 (internal quotations omitted). In this case, just as in *Transcontinental,* "FERC explicitly or implicitly subscribe[d] to these factors." *Ibid.*

[7] CIG claimed that, even if minimum bills were invalid in general, its particular minimum bill provision had no specific anticompetitive effect on Natural, alleging that in 1985 Natural had purchased gas from suppliers other than CIG at prices nominally higher than the CIG contract price and that in 1984 Natural did not take "full" advantage of the opportunity to reduce its reservation of CIG gas (although Natural did reduce its reservation by 40% at that time, *see* CIG C.A. Reply Br. 4). Pet. App. 9a-10a. The court of appeals rejected CIG's claim, citing FERC's responses—first, that even if CIG's view of Natural's purchasing practices were correct, the minimum bill might still have caused Natural to limit its gas purchases from suppliers other than CIG or to purchase a different mix of services from its pipeline suppliers; second, that it was the *ability* of Natural to pursue a least-cost purchasing strategy, and not Natural's actual pursuit of such a strategy, that determined whether the bill was anticompetitive; and third, that Natural could not be faulted for limiting its reduction of reservations in 1984, given the difficulty of accurately predicting future gas purchases and the unreasonableness of expecting Natural to have reserved *no* gas from "one of its largest historical suppliers." Pet. App. 10a-11a. In the end, the court of appeals, citing testimony of one of Natural's witnesses that factors other than price motivate a gas company's choice of supplier, declined CIG's invitation to "speculate" as to "the motives behind [Natural's] purchasing decisions" as a basis for

The court of appeals also upheld FERC's finding that the minimum bill here was not justified "as a means of minimizing take-or-pay costs." Pet. App. 18a. The court approved the Commission's requirement that a pipeline like CIG show a "'specific connection between its minimum bill and its take-or-pay obligations.'" *Ibid.* (quoting *id.* at 61a).[8] Here, the Tenth Circuit explained, CIG did not meet that standard because it had offered "no evidence" that *Natural's* cutbacks "'caused or will cause particular minimum bill or take-or-pay obligations to be incurred [by CIG].'" *Id.* at 18a-19a (quoting *id.* at 77a).[9] CIG had failed even to quantify for the Commission any take-or-pay liability that it had incurred as a result of Natural's failure to purchase gas. *Id.* at 20a.[10]

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overturning FERC's finding that this minimum bill, like others, was anticompetitive. Pet. App. 11a-12a.

We note that, in other proceedings, FERC has rejected similar challenges by CIG to Natural's purchasing practices. *Natural Gas Pipeline Co. of America,* 34 FERC ¶ 61,280, at 61,495 (1986); *Natural Gas Pipeline Co. of America,* 30 FERC ¶ 61,222 (1985).

[8] The court noted the agency's view, shared by the D.C. Circuit, that a minimum bill "must be designed *solely* to remedy [a pipeline's] take-or-pay problem." Pet. App. 18a n.20 (emphasis added) (citing Pet. App. 77a n.35 and *Panhandle Eastern Pipeline Co. v. FERC,* 881 F.2d 1101, 1113 (D.C. Cir. 1989)). The D.C. Circuit said in *Panhandle Eastern* that a minimum bill "may be justified if 'specifically designed to achieve [one of the *Seaboard* remedial ends], but nothing more.'" 881 F.2d at 1113 (citations omitted).

[9] The court of appeals stated that CIG "may have been unable to make such a demonstration, given that CIG's sales to customers other than [Natural] apparently also had declined in recent years." Pet. App. 19a; *see also supra* note 5.

[10] The court also pointed out that CIG's argument that its minimum bill provision created an economic incentive for Natural to purchase gas from CIG, which in turn allowed CIG to avoid take-or-pay liabilities, was severely undercut by CIG's own "repeated emphasis on [Natural's] failure to buy CIG's gas in favor of more costly supplies" even while the minimum bill was in effect. Pet. App. 20a. In addition, the court observed that CIG had not re-

The court of appeals subsequently denied CIG's petition for rehearing and suggestion for rehearing en banc. Pet. App. 27a-28a.

REASONS FOR DENYING THE PETITION

The court of appeals correctly applied settled principles to review an agency determination on the particular administrative record developed in this case. Petitioner's several challenges rest on misreadings of the court's and the agency's fact-specific decisions. The case does not present any issue of general or continuing importance.[11] Nor does the ruling below conflict with any decision of this Court or of any other court of appeals. Review should be denied.

Petitioner first contends that the court of appeals decision "shifts the ultimate burden of proof to pipeline suppliers in minimum bill cases." Pet. 8. That contention simply misunderstands what the court of appeals held. Nowhere does petitioner cite any passage in the court of appeals' opinion that removes the burden of persuasion from those challenging the minimum commodity bill and places it on the pipeline seeking to retain the provision. *See* Pet. 9-12. Rather, the court acknowledged that the Commssion "bears the burden of proving that the existing rates are unjust and unreasonable." Pet. App. 4a. The court then went on (*id.* at 5a-12a) simply to affirm the Commission's application of the repeatedly articulated proof scheme: the challengers carry

sponded to FERC's argument on appeal that elimination of the CIG-Natural minimum bill would not automatically lead to increased take-or-pay costs to CIG, because "CIG's [take-or-pay contracts] contain[] a crediting provision" that permits penalty payments to be credited to subsequent gas purchases. *Id.* at 20a.

[11] Notably, petitioner does not assert that pipeline minimum commodity bills present a significant future problem. In fact, the service agreement between CIG and Natural that is at issue in this case expired on September 30, 1989, and has been abandoned pursuant to 18 C.F.R. § 157.21.

the burden of proving anticompetitiveness and hence invalidity, but the familiar and straightforward economic analysis relied on below meets that burden unless the pipeline has come forward with evidence to the contrary, which CIG failed to do (Pet. App. 58a-60a, 73a-74a). Accordingly, nothing in the decision below is inconsistent with the decisions of the Fifth and D.C. Circuits that likewise applied the Commission's proof scheme. *See* Pet. 10-11 (citing *Transwestern Pipeline Co. v. FERC*, 820 F.2d 733, 746 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988), and *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1104 (D.C. Cir. 1989)).[12]

Petitioner next argues that the decision below conflicts with the D.C. Circuit's ruling in *Transcontinental Gas Pipe Line Corp. v. FERC*, 907 F.2d 1211 (1990). Pet. 13-16. But even the asserted basis of conflict would plainly not warrant this Court's review—that the D.C. Circuit allegedly requires a somewhat less specific connection between a minimum commodity bill and take-or-pay liabilities in order for an anticompetitive minimum bill to be upheld. *See* Pet. 14. In any event, the asserted conflict is illusory. The D.C. Circuit applied a "direct link" standard in *Transcontinental* (907 F.2d at 1215) and elsewhere has indicated that any minimum commodity bill must be narrowly tailored to remedy any take-or-pay problem (*see* Pet. App. 18a n.20). On its facts, moreover, the *Transcontinental* ruling is entirely consistent with the finding of an insufficient showing of a linkage to take-or-pay liability in this case.

In *Transcontinental*, the D.C. Circuit remanded for FERC to reconsider its invalidation of a minimum bill because the necessary "direct link" appeared to be clearly demonstrated. 907 F.2d at 1215. The court explained

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[12] The Tenth Circuit opinion in this case cited and relied on those decisions at various places in its analysis, including on the question of burden of proof. *See, e.g.*, Pet. App. 5a, 11a n.10, 13a n.14, 17a, 19a.

that the pipeline faced "take-or-pay obligations nearly equal to the capacity of its system" and that the minimum bill applied only if the customers bought less than 65% of their contract demand. *Id.* at 1212, 1213. Hence, "any significant drop in demand [below the minimum bill level would] cause the incurrence of take-or-pay liability." *Id.* at 1213. "As a matter of fact—whether by design or chance—this situation results in the linkage of Transco's minimum bills to the causation of take-or-pay charges." *Id.* at 1214. In the present case, by contrast, the court of appeals and the Commission concluded that CIG had simply failed to demonstrate that any deficiencies in purchases by Natural under its *90%* minimum bill (affecting an unspecified portion of CIG capacity, an unspecified portion of which was affected by take-or-pay problems) would in fact lead to specific take-or-pay liabilities. Pet. App. 18a-20a, 61a, 77a. Petitioner has not undermined that fact-specific conclusion.[13]

Finally, petitioner alleges that the "court of appeals' decision retroactively applies a new Commission presumption that all minimum bills, even those strictly limited to fixed costs, are anticompetitive." Pet. 16. According to petitioner, the court of appeals erred in failing to remand this matter to FERC for consideration of whether the presumption—announced in *Transcontinental Gas Pipe Line Corp.*, 40 FERC ¶ 61,188 (1987), after the ALJ ruling here—should be "retroactively" applied in this case. Pet. 16-18.[14] But even if this contention were other-

[13] Petitioner has not refuted the court's explanation of the inadequacy of CIG's proof of a linkage between this minimum bill and any actual take-or-pay liability. The testimony that petitioner cites fails by its very terms to make such a showing: it refers to unspecified " 'resulting liability,' " to " 'take-or-pay obligations *generally* vary-[ing] inversely with sales,' " and to mere " 'exposure' " to such obligations. Pet. 15 n.12 (emphasis added).

[14] The *Transcontinental* presumption was upheld by the D.C. Circuit in *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 935-40 (D.C. Cir. 1988), prior to the D.C. Circuit's *Transcontinental* decision discussed above. *See* 907 F.2d at 1212.

wise worthy of this Court's review, which it plainly is not, the argument rests on a misreading of the ruling below.

Neither the court of appeals nor the Commission rested its anticompetitiveness ruling on the *Transcontinental* presumption. Although the Commission cited *Transcontinental*, it did so, insofar as relevant here, only as support for its statement that Natural and FERC had the burden of proof and for its rejection of one of CIG's proffered defenses of the minimum bill once the issue of anticompetitiveness was decided. Pet. App. 58a n.124, 60a n.133, 76a n.31. And the court of appeals itself recognized that the Commission's anticompetitiveness finding rested on testimony in this proceeding, rather than on the authority of *Transcontinental*, and expressly upheld it on that basis. Pet. App. 8a-9a.

The court of appeals did state that FERC *could* have relied on the *Transcontinental* presumption in deciding this case (Pet. App. 7a-8a), but that statement, aside from being unnecessary to the decision, was correct. Such reliance would not have been "retroactive," because *Transcontinental* was decided *before* FERC (as opposed to the ALJ) ruled in this case. And applying the presumption would not have unfairly prejudiced CIG's opportunity to make an adequate record, because CIG knew full well at the ALJ hearing that the minimum bill was in dispute and that it had to introduce whatever evidence it had to show that the minimum bill was not actually anticompetitive (or was justified even though it was anticompetitive). *See* Pet. App. 59a-60a, 75a. In short, the decision below does not rest on the anticompetitiveness presumption, and the court of appeals did not approve any troublesome "retroactivity" causing unfairness to litigants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL E. GOLDSTEIN
701 East 22nd Street
Lombard, IL 60148

PAUL KORMAN
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

J. CURTIS MOFFATT
VAN NESS, FELDMAN & CURTIS
1050 Thomas Jefferson Street
Washington, D.C. 20007

JOEL I. KLEIN
(Counsel of Record)
RICHARD G. TARANTO
ALAN E. UNTEREINER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

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